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RESEARCH ARTICLE

Imperious Temptations: Democratic Legitimacy and Indigenous Consent in Canada

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Abstract

Canadian courts and governments increasingly invoke principles of mutual consent and nation-to-nation negotiation as central to the goal of addressing colonial injustices in a democratic society. However, Canada continues to interpret its obligations according to the Crown's fiduciary obligation to merely consult and accommodate Aboriginal peoples on infringement of their rights. In this article, I argue that there are conceptual resources available within existing Canadian law and politics for reconstructing a democratic consensual resolution to the problem of Indigenous exclusion and dispossession. I demonstrate that meeting the basic threshold of mutual consent would first require Canadian institutions to abjure the imperious temptation to impose parochial standards of free, prior and informed consent. Second, the Crown would refuse to ensnare Indigenous communities in unconscionable bargains, agreements that they would not otherwise view as reasonable, fair or equitable. And finally, Canada would accept rights of jurisdiction over land rooted in vital relations of health and well-being, as well as a corollary right of refusal or veto over decisions deemed by affected parties to be unwanted.

Résumé

Les tribunaux et les gouvernements canadiens invoquent de plus en plus les principes du consentement mutuel et de la négociation de nation à nation, jugés essentiels dans le but de réparer les injustices coloniales dans une société démocratique. Toutefois, le Canada continue d'interpréter ses obligations en fonction de l'obligation fiduciaire de la Couronne de simplement consulter et accommoder les peuples autochtones au sujet de la violation de leurs droits. Dans cet article, je soutiens qu'il existe dans les lois et les politiques canadiennes en vigueur des ressources conceptuelles pour réinventer une solution démocratique consensuelle au problème de l'exclusion et de la dépossession des autochtones. Je démontre qu'atteindre le seuil fondamental du consentement mutuel exigerait en tout premier lieu que les institutions canadiennes renoncent à la tentation impérieuse d'imposer des normes étriquées de consentement libre, préalable et éclairé. Deuxièmement, la Couronne refuserait de piéger les communautés autochtones dans des négociations indéfendables, des ententes qu'elles ne considéreraient pas autrement comme raisonnables, justes ou équitables. Enfin, le Canada accepterait des droits de juridiction sur des terres ancrées dans des relations vitales de santé et de bien-être, ainsi qu'un droit corollaire de refus ou de veto sur des décisions jugées indésirables par les parties concernées.

Indigenous Consent in Canadian Democracy

Since Canada's recognition of Aboriginal rights in sec. 35(1) of the 1982 Constitution, and in the wake of the subsequent failure of the Constitutional conferences in the 1980s to determine the substance of those rights, Canadian courts and governments have been encouraged to cultivate a more inclusive and democratic relationship between Canadian and Indigenous societies (Barker et al., 2016). Perhaps the most robustly democratic ideal endorsed by both Canadian and Indigenous political traditions is that of mutual consent (Henderson, 1994). Consent is central to Western ideals of democratic legitimacy (Gover, 2016) and most systems of Indigenous political thought consider it fundamental that members of a community consent to the norms by which are governed (see, for example, Napoleon, 2010). Mutual consent is the standard of legitimacy embodied in the nation-to-nation treaty relationship and the Royal Proclamation of 1763 (Webber, 2010). More recently, mutual consent has been identified as the threshold of equitable and just relations by the Royal Commission on Aboriginal Peoples (1996); the UN Declaration on the Rights of Indigenous Peoples (2007), which articulated the principle of free, prior, and informed consent (FPIC); and the Canadian Truth and Reconciliation Commission (2015), which reaffirmed UN standards of FPIC. A commitment to mutual consent was articulated by the Supreme Court of Canada in the landmark *Tsilhqot'in* (2014) decision and, most recently, the federal Liberal party (2015) and provincial NDP governments in both Alberta (2015) and British Columbia (2017) have each publicly committed to a revitalization of governance based on Indigenous consent.

In Western democratic thought, consent is a central part of the all-affected principle, the idea that those who are affected by a decision ought to have opportunities to participate in and influence the decision (Warren, 2011), usually in proportion to the degree that they will be affected (Goodin, 2007: 51). As James Tully has observed, the idea that those affected by a decision must consent to its represents "one of the oldest principles of Western constitutionalism" and a political ideal that "has been revived and given dialogical reformulation as the principle of democratic legitimacy" (2001: 24). In this sense, the legitimacy of Canadian democratic political institutions hinges on the consent of those who will be affected by regulations and laws and only those who are granted substantive opportunities to influence the creation of those norms and laws can be said to have given their consent.

In the Canadian context the all-affected principle applies not just to individual citizens but also to groups such as Indigenous nations whose collective fates are bound up in political decisions that affect their traditional territories (Williams, 2004: 102). In practice, despite an ostensibly strong democratic tradition of governing by consent, and despite an official endorsement of free, prior and informed consent as an international benchmark of legitimacy, Canadian governments and courts have opted to pursue a much less demanding duty to accommodate the rights and interests of Indigenous peoples through consultation. Consultation is increasingly presented as sufficient to fulfill the standard of free, prior and informed consent, even though this consultative vision of Canada's fiduciary duty to safeguard Indigenous interests stands in deep tension with the ideal of consent: "A crucial fault line in the positive law and jurisprudence separates a duty to

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consult indigenous peoples from a duty to acquire their free, prior and informed consent" (Fox-Decent and Dahlman, 2015: 510). Recent Canadian governments have argued that consultation is actually a more promising ideal than that of mutual consent because the latter is simply too demanding and could effectively give Indigenous peoples a legislative veto, which would subvert not only the efficacy of good governance but also the principles of constitutionality and Parliamentary supremacy (Government of Canada, 2014). Some critics have claimed that the language of an Indigenous veto is misplaced and even incongruent with a commitment to consent understood as a collaborative rather than unilateral process (Joffe, 2016; Bryant 2016). More ardent advocates of consent have argued that the language of free, prior and informed consent is conceptually vacuous if interpreted exclusively through the lens of Canadian law without any real possibility of Indigenous dissent (Simpson, 2016). What we find, then, is that respect for Indigenous rights and the legitimacy of Canadian democratic institutions is hamstrung by fundamental disagreements on the nature and necessity of a robust principle of mutual agreement (Lightfoot, 2012).

Unfortunately, one consequence of qualifying and softening the ideal of consent is that the future of Canada/Indigenous relations becomes untethered from the democratic principle of affected interest and the promise of legitimate democratic negotiations. In the following, I argue that there are conceptual resources available within existing Canadian law and politics for reconstructing a democratic consensual resolution to the problem of Indigenous exclusion and dispossession. The article proceeds by first demonstrating that disparate and sometimes conflicting models of consent found in common law, international law and Canadian politics nevertheless offer tools for evaluating and reforming Canada's consultative approach to Indigenous claims. My aim is to identify and dispel confusions that lead to the disqualification of Indigenous peoples from decision-making processes *in violation of the all-affected principle*. Throughout this argument, I show that mere consultation with Indigenous peoples, with no possibility of meaningful Indigenous refusal or dissent, invalidates any claim Canada might make to have acquired Indigenous consent or to have included affected Indigenous peoples in a decision-making process.

Another aim of the article, then, is to elucidate the confusions that obscure how Indigenous consent is required for the fulfillment of Crown obligations (Mohanty and McDermott, 2013). I suggest that we can plumb the common law tradition to discover insights into consensual relations as they occur between partners who occupy unequal bargain positions. To that end, I argue that efforts to secure Indigenous consent must not run counter to the common law doctrine of unconscionability, which stipulates that a more powerful party cannot legitimately compel a weaker party to accept terms that they would reasonably reject under conditions of substantive equality (Bogden, 1998). Legal understandings of consent are foregrounded in this article not because Canadian law has special claim to jurisdiction over these issues in principle but because one of the particularities of the Canadian context is that courts have been made largely responsible for administration of Indigenous political claims. Indeed, courts tend to struggle with Indigenous claims precisely because such claims only loosely fit within established traditions of legal reasoning and refer to relationships that are deeply imbricated in the vagaries of Canadian history and politics. In this sense, the article attends to the way law

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sometimes serves uncomfortably as a proxy for the negotiation of broader political principles and policy demands.

Indigenous legal systems are diverse and Canadian institutions find themselves having to respond to different sets of criteria and protocols for generating and maintaining mutual consent (Rollo, 2017). This obligation, I argue, requires that state and economic actors must reject what James Tully refers to as

> the imperious temptation to claim monologically and unilaterally that a set of norms is universal and transcendental; that it is uniquely embodied in one universal set of political, legal, and economic institutions; and that some agent has the right and duty to impose coercively the norms and institutions on others without their consent. (2011: 151)

To illustrate, the principles and ideals of democratic consent discussed in this article will be evaluated according to how effectively they satisfy the hard case of negotiations with Indigenous communities in which women traditionally hold special legal and political authority (see Altamirano-Jiménez, 2013; Kuokkanen, 2011, 2016; Simpson, 2011). The focus on Indigenous women is important because the intimate connection between the health of environments and the health of Indigenous peoples is most salient in the case of Indigenous women. More specifically, I explore how the principle of affected interest is activated by the potential impact of resource extraction and industrial development on the cultural and reproductive well-being of Indigenous women (Turpel, 1993). My central argument here is that to the extent that Indigenous women are disproportionately and gravely affected by decisions involving land and water, a commitment to democratic principles requires that their consent be recognized as having priority over lesser claims, such as those based on mere property interest. This higher standard of consent might apply not just for an industry application to extract resources but also for legislation involving lands and waters more generally (see, for example, *Canada* v. *Mikisew Cree First Nation*, 2017).

It is important to note that I will be examining how Canadian political institutions handle Indigenous consent and that I do not purport to explain or adjudicate over debates *within* Indigenous communities on issues of traditional, authentic or legitimate political authority. Rather, the arguments presented here assume that contestation is ongoing within Indigenous communities (see Coulthard 2014) and that claims advanced in those internal dialogues are appropriately beyond the purview of my discussion on Canadian democratic institutions, especially as it concerns various Indigenous rematriation movements that are responding to specific legacies of colonial patriarchy (Kuokkanen, 2016; Simpson, 2016). In the end, I am motivated by the sense that it is incumbent on Canadian legal and political theorists to respond to Indigenous claims by clarifying and articulating the obligations that Canadians and the Canadian state have with respect to Indigenous peoples.

Democracy, Fiduciary Duty and Indigenous Consent

Canadian officials have declared that the UNDRIP principle of free, prior and informed consent will not override existing Canadian law and will be interpreted

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in congruence with the Constitution and existing juridical interpretations of Indigenous rights (Government of Canada, 2017). From this perspective, consent is to be understood in accordance with the established common law recognition of Indigenous rights, treaty and title as *sui generis*. The defining characteristic of *sui generis* rights is that they do not originate in Canadian law or derive their authority from Canadian sovereignty. It is not the case, however, that Canadian law straightforwardly applies rights in ways that perfectly reflect how they are conceived in Indigenous legal systems. Rather, the *sui generis* nature of Aboriginal rights reflects Canada's blanket common law recognition that Indigenous peoples have claims that must be considered. Despite its limitations, Canada's recognition of rights of jurisdiction over land does serve as a starting point for building a genuinely democratic approach to consent. In *Delgamuukw*, for example, the Supreme Court observed that "Aboriginal title has been described as *sui generis* in order to distinguish it from 'normal' proprietary interests, such as fee simple" (1998: 112). The *sui generis* nature of these rights, once recognized by Canada, means that access to title lands by non-Indigenous governments and industries is contingent on gaining some form of consent from particular Indigenous communities. Indeed, the intent of historical treaties was to preserve precisely this relationship of mutual respect in accordance with the Royal Proclamation of 1763 (Asch, 2014; Borrows, 1997). Far from a trivial political detail, Aboriginal *sui generis* rights to land and the use of land are constitutionally enshrined in Sec. 35(1) and Canada recognizes that given its position of relative power the Crown has a duty of trust and loyalty—a *fiduciary* duty—to recognize, respect and safeguard such rights (see *Manitoba Mètis Federation* v. *Canada*, 2013).

It is important to recognize that some beneficiaries of a fiduciary relationship such as children or peoples with disabilities might lack capacities for autonomy, yet this is not the case in all fiduciary relationships. The existence of a fiduciary relationship does not entail that the beneficiary is incapable of self-determination or of issuing consent (Getzler, 2014). Fiduciary duties often arise because the fiduciary possesses unique capacities (in the case I am discussing, the administrative and funding capacities of the Canadian state) that it is entrusted to deploy in the service of a more vulnerable beneficiary. In these situations the role of the fiduciary is to provide resources and protections required by the beneficiary to properly exercise their self-determination without undue burden or interference. To the extent that a fiduciary in this context withholds resources or protections or sets unreasonable conditions for their procurement or makes decisions without the consent of the beneficiary, the fiduciary will be in breach of their duties (McNeil, 2008: 909–12). It is in this sense that Canada has a fiduciary duty to protect the interests, autonomy and security of Indigenous peoples. My aim in the following section, then, is to demonstrate with reference to Indigenous women's well-being that such protection entails acquiring Indigenous consent in any decision-making process involving lands.

Indigenous women, lands and bodies

Canadian common law courts recognize the *sui generis* nature of Aboriginal title, treaty rights and harvesting rights, yet these examples do not exhaust the variety

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of claims advanced by Indigenous peoples and so they are not the only interests for which Canada's fiduciary obligations become applicable. There is nothing that restricts Aboriginal rights in principle to historical treaty, to contemporary use, or to past use. Indeed, given that many communities have been forcibly relocated from their traditional territories, to limit Canada's obligations based on the failure of an Indigenous community to prove historical use or occupation would constitute a spuriously arbitrary and coercive limit on Indigenous claims.

Moreover, insofar as Indigenous peoples are affected by a decision involving land use, the democratic principle of affected interest enjoins Canadian institutions to recognize those claims as binding and, if they involve rights claims, recognize those rights as *sui generis*. In short, another vital source of Indigenous rights, according to many Indigenous peoples, is the reciprocal relationship between Indigenous lands and bodies, most notably connections involving the health and cultural responsibilities of Indigenous women (Anderson, 2010). Alterations to lands and waters incurred through resource extraction, infrastructure projects or industrial development have the potential to affect the well-being of an environmental system as well as the Indigenous peoples who reside, conduct ceremony and cultivate food, water, medicines and cultural materials on that territory. Injuries to environmental health can constitute injuries to the spiritual, cultural, psychological and physical health of Indigenous peoples who are both reliant on and responsible to particular lands, waters, and species (Hoover et al., 2012).

Many Indigenous women are disproportionately affected by alterations to lands and waters by virtue of their unique roles as the bearers of both cultural memory and of children. For this reason, the Women's Earth Alliance and the Native Youth Sexual Health Network (2013) have emphasized that it is "impossible to discuss the proliferation of environmental violence without first having an understanding of consent—both Indigenous peoples' free, prior and informed consent (FPIC) over their territories, as well as their consent over their bodies" (16). Indigenous women's reproductive autonomy is deeply dependent on environmental health, for as Mohawk midwife Katsi Cook famously observed "women are the first environment." Likewise, according to the Ontario Native Women's Association:

> The distinct relationship between women and water according to many Aboriginal cultures is connected to the fact that women's bodies have the capacity to host and sustain the life force that water represents … [W]omen carry water during pregnancy, and the first part of giving birth involves the release of that water. (Anderson 2010: 9)

In essence, some Indigenous perspectives on FPIC view it as a process that invariably involves "both Indigenous lands and bodies" (11) and within these Indigenous legal systems the depth of the relationship between lands and bodies goes beyond a mere property interest in either land or one's body. The ways that many Indigenous women are concerned about environmental well-being reflects a vital and immutable relation:

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> The waters of the Earth and the waters of our bodies are the same; for better or for worse, there is an undeniable connection between the health of our bodies and the health of our planet. Violence that happens on the land is intimately connected to the violence that happens to our bodies. (WEA and NYSHN, 2013: 4)

There is an intimacy entailed in obtaining Indigenous consent, then, for insofar as the Crown seeks access to Indigenous lands it commits itself, at least in principle, to uphold the bodily integrity and reproductive health of Indigenous women.

This relationship is not exclusive to Indigenous women, of course, and Canada's historical reticence to safeguard women's bodily integrity and autonomy represents a more general failure identified by mainstream feminism (Koshan, 2010) and Indigenous feminists alike. However, the struggle of Indigenous women is distinct in that it unfolds at the intersection of patriarchal and colonial orders, involving gendered, racial, and colonial violence that compromises collective autonomy and political connections to land (Simpson, 2014). As Dory Nason has indicated, Indigenous legal and political ways of being must be honoured because they "provide a framework that ensures Indigenous women's relationship to the land and their human right to bodily sovereignty remain intact and free from violation" (2013: para. 1). Harm to the natural environment constitutes harm to the fundamental health and well-being of Indigenous women, much more than a simple "interest" that can be appropriately compromised or balanced against the supervening interests of governments and industries. As such, the explicit consent of women is foundational to any fulfilment of the principle of affected interest. In cases where the Crown asserts that explicit consent is *not* required for access and exploitation of lands, Canada is at serious risk of compromising the bodily integrity of Indigenous women and diminishing the democratic legitimacy of its decision-making institutions.

Free, prior and informed consent

It is central to the coherence of an ideal of consent that agreement cannot be imposed by the more powerful party. Though not without problems, the UNDRIP doctrine of free, prior and informed consent offers a basic framework for evaluating such negotiations. The UNDRIP is not itself an Indigenous declaration but a set of international human rights standards developed by state actors in co-ordination with Indigenous peoples. It should not be surprising, then, that Indigenous interpretations of what constitutes free, prior and informed consent differ significantly from most Canadian interpretations. I will take a moment to specify some of the major differences and show how a genuinely democratic agreement should aspire to incorporate *both* frameworks.

If FPIC is to be a guide to reconciliation its varied interpretations must be shown to be more or less compatible rather than competitive and mutual exclusive. A non-competitive approach is one in which the standards and protocols of both parties are accepted, as exemplified in the historical treaty process, which was at times conducted according to an ideal of mutual equality and consent (Imai, 2017). In most treaty contexts, "parties based their negotiations and consent on their own

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understandings, assumptions and values, as well as on the oral discussions" (RCAP I, 1996: 161). There have been legal decisions expressing a similar ethos of equality. The *R v. Delgamuukw* decision, for instance, stated that the relationship between Canada and Indigenous peoples is "not one of competing interests but of reconciliation" (1998: para. 17). The Inter-American Court elaborated on this basic premise and determined that when dealing with Indigenous claims to land, states must "obtain their free, prior, and informed consent, *according to their customs and traditions*" (*Saramaka People v. Suriname,* 2007: n.43). Mutual consent, if it is to reflect relations of equality and reciprocity, cannot be judged on the satisfaction of dominant notions of consent alone.

With this in mind, let us briefly consider the ways in which the language of free, prior and informed consent has been unpacked in very disparate ways. It is important to note that the discrepancies between Canadian and Indigenous ideas of consent shown here are by no means exhaustive, nor do they apply to all Indigenous traditions universally. They do serve, however, to illustrate some of the major discrepancies plaguing the use of FPIC as a guide to mutual consent. I suggest that such discrepancies are not fatal and that officials and institutions must be cognizant of their existence if FPIC is to serve as a useful guide.

1. With respect to the condition of *free* consent, the United Nations Permanent Forum on Indigenous Issues (UNPFII, 2005) has clarified that "Free should imply no coercion, intimidation or manipulation" (12). For many Indigenous peoples, however, freedom speaks to relations of mutual equality and reciprocity, relations that entail not just freedom from coercion but also freedom to refuse or dissent to a particular aspect of a decision or to the decision as a whole. Thus, prohibiting the use of coercion or fraud is important if somewhat redundant given that it is already implied in any genuine commitment to equality and reciprocity. Freedom to consent is never just *freedom from* but "freedom to decide (to consent or to say no)" (Castillo and Alvarez-Castillo, 2009: 279). Whereas most Indigenous ideals of consent aspire to the political equality of partners (for example, a nation-to-nation agreement, even under conditions of economic or administrative inequality), the Crown tends to interpret agreement as a private contractual arrangement that, however unfortunate in terms inequality, can only be deemed void if proven to result from *explicit* force or coercion. Operating with such a low standard, officials and institutions are oriented to misinterpret the acquiescence or compliance of vulnerable Indigenous peoples to an unequal arrangement as constituting a legitimate binding agreement.

   In the following, I will refer to cases of agreement under conditions of inequality and vulnerability as examples of mere *assent* which is to be distinguished from a robust sense of *consent* between equals. One advantage of recognizing the difference between *assent* and *consent* is that a decision to which a disadvantaged partner has merely assented can be viewed as illegitimate without diminishing the agency of the disadvantaged party. Indigenous peoples may choose to assent for strategic purposes such as harm reduction. As stated in the introduction, however, my argument here focuses solely on the onus that falls on the advantaged party to demonstrate that they are not exploiting an

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unequal situation to their own advantage. This standard, as we shall see, is vital for understanding Canada's fiduciary responsibilities as they apply to Indigenous communities, especially to women within those communities. As I explain below, for agreement to qualify as consensual it must include freedom to dissent without penalty.

2. With respect to the condition of Indigenous consent being granted *prior* to decision making, the UNPFII has indicated that "prior should imply that consent has been sought sufficiently *in advance* of any authorization or commencement of activities and that respect is shown for *time requirements* of Indigenous consultation/consensus processes" (2005: 12, my emphasis). Here, the condition of priority is interpreted exclusively in terms of temporal precedence, where consent that has been established *before* the implementation of the new policy. By contrast, most Indigenous peoples interpret priority to include both temporal as well as structural or procedural precedence in the sense that consent is never singular and final but must also be maintained throughout the relationship in order for it to be binding. Put another way, consent must be both chronologically *and logically* prior to implementation if it is to qualify as genuine consent. Canada's interpretation of priority leads to the mistaken understanding of antecedent agreement as being more or less final, static and binding in perpetuity. Here, there seems to be little recognition that the consent of Indigenous women to risks involving her body will be afforded an expansive sense of priority and cannot be considered binding in perpetuity. Indigenous women have a right to say no at any time before or during the process if they judge their reproductive autonomy and bodily integrity to be at risk.

   In situations involving parties who are relatively equal with respect to bargaining power, the priority of consent falls equally on both parties. We find such a vision of agreement forged between Canadian and Indigenous peoples as equals in the idea of "collaborative consent" (see Ishkonigan, 2015). However, from the perspective of partners in positions of unequal bargaining power, such as those in a fiduciary relationship, both temporal and structural priority are normally granted to the more vulnerable party. If a fiduciary attempts to disqualify the dissent of the beneficiary on the grounds that the dissent followed an initial expression of consent, the fiduciary has vitiated the principle of affected interest and abandoned common law understandings of what constitutes a consensual relationship. As I shall demonstrate with some examples below, in situations involving an autonomous beneficiary (as opposed to a situation involving a young child or a person with severe cognitive disabilities), the beneficiary is always empowered to decline arrangements made by the fiduciary. This means, for example, that contract-like relations such as impact benefit agreements between industries and vulnerable Indigenous communities (Whitelaw et al., 2009) must *at any point* be qualified by the Crown's fiduciary duty to protect women's rights of refusal to decisions that affect their bodies.

   The application of priority in cases of affected interest can be found in *Sparrow*, where it was decided that in "giving aboriginal rights

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constitutional status and *priority*, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected" (*R. v. Sparrow*, 1990: 37). Indeed, with respect to Canada's duties as fiduciary, it was observed that "Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of *priority*" to Indigenous peoples (7). The *Sparrow* decision was by no means a blanket recognition of the priority of Aboriginal consent or a declaration that such rights are fixed and absolute irrespective of any other consideration. However, *Sparrow* did acknowledge the principle of priority for specific Aboriginal rights, in this case rights to fishing, and a sense in which Indigenous rights can be understood as having not just temporal but procedural or structural priority.

3. The UNPFII has defined the principle of informed consent in terms of a right to be provided empirical evidence including data showing the scope, rationale, duration, locality, benefits, risks, personnel and procedures of a particular policy or project (2005:12). In the Canadian context, the standard of informed consent has been interpreted to mean that Indigenous peoples must be informed of policies and projects, many of which have already been devised or approved by government and industry. In order for their perspectives to be reasonably accommodated, Indigenous peoples are permitted an option to assent upon being officially notified and consulted with relevant information. By contrast, in most Indigenous legal and political traditions, informed consent refers to agreement on policies or projects that have been developed in consultation with a broader range of applicable knowledge systems (McCrossan and Ladner, 2016). Indigenous peoples frequently take non-Indigenous knowledge into consideration but privilege Indigenous systems of knowledge, which may not be strictly empirical but personal, gender specific, location specific, secret or at times incommunicable (Rollo, 2014).

Despite these differences between Canadian and Indigenous interpretations, there appears to be no *prima facie* reason why both Canadian and Indigenous standards cannot be satisfied concurrently; the visions of consent offered here, while disparate, do not suggest mutually exclusive or categorically opposed intentions. Consent can be free from coercion as well as include an option of free refusal. Consent can be viewed as prior both in terms of temporal precedence and structural precedence. Finally, consent can be informed by both non-Indigenous and Indigenous knowledge systems.

What is important for this discussion is that Indigenous interpretations of FPIC do aim toward a broader and stronger ideal of consent than that of Canadian interpretations, which tend to rely on the narrower and weaker standard of assent. One reason for this low standard is a concern that Indigenous peoples might refuse and withhold consent in an attempt to exercise an illegitimate "veto" power over Canadian law. Not surprisingly, Canada's late support for UNDRIP in 2010 came with the qualification that anything approaching veto power for Indigenous peoples was out of the question. This qualification is premised on the idea that a

decision rendered without the prior consent of an affected party can still be legitimate and that the power to veto the decision is illegitimate. Perhaps as an acknowledgment of the anti-democratic implications of such a heavily qualified commitment to equality, in 2016 the Federal Government committed itself as a "full supporter, without qualification, of the declaration" and pledged to "implement the declaration in accordance with the Canadian Constitution" (Government of Canada, 2016).

The status of a possible Indigenous veto remains unresolved and I would like to suggest that if the legitimacy of decision making is to be interpreted in ways that are inclusive of Indigenous traditions of consent on an equal basis (that is, decision making under conditions of equal freedom, including freedom to dissent, structural as well as temporal priority, and the privileging of Indigenous knowledge systems) a right to veto decisions affecting the land may be acknowledged as produced by a binding *sui generis* right to refuse arrangements that affect bodily integrity. The idea of a veto is contentious even among advocates of FPIC. Paul Joffe, for example, has argued that the language of veto is simply inappropriate:

> The term "veto" is not used in the *UN Declaration on the Rights of Indigenous Peoples*. "Veto" implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of the *UN Declaration*, which includes some of the most comprehensive balancing provisions in any international human rights instrument. (2016: 8)

There are good reasons why a veto appears to be a non-starter from a strictly legal perspective according to which conflicting rights and interests are typically subject to a balancing act of compromises. However, in democratic systems the mechanism of political veto often functions to promote the balancing of rights. A political decision-making process that involves groups who occupy different relative positions of power will often feature several veto points, each providing opportunities for vulnerable parties to withdraw and avoid egregious violations of good faith negotiation and, accordingly, establishing incentives for powerful actors to remain cognizant of the power imbalances that can derail or delegitimize negotiations. We may recall that in 1990, Manitoba MLA Elijah Harper withheld his consent in the Manitoba parliament and effectively vetoed the Meech Lake Accord on the grounds that it did not attend to the rights and claims of Indigenous peoples. As a result, the next attempt at Constitutional reform, the Charlottetown Accord, involved a much more inclusive and responsive set of negotiations. Veto power is an important democratic tool in the hands of the marginalized, as political theorist Iris Young made clear in her claim that democratic respect for equality requires oppressed groups to possess "veto power regarding specific policies that affect a group directly, for example, reproductive rights for women, or use of reservation lands for Native Americans" (1989: 261–62). In the case of Indigenous peoples, such rights to reproductive and environment health are often inextricably linked and a veto becomes an indispensable democratic mechanism. In short, an Indigenous veto only poses a problem to the efficiency and sanctity of Canadian democratic institutions if one assumes the rather anti-democratic position that

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excluding Indigenous peoples from political decisions that affect them has no bearing on the democratic legitimacy of those decisions.

To summarize, democratic legitimacy and the fulfilment of Canada's fiduciary duties hinge on a robust commitment to Indigenous inclusion and consent. It will be necessary for Canada to recognize and uphold Aboriginal rights that are rooted not only in title, treaty or harvesting rights but also in Indigenous relations of responsibility and reciprocity with lands and waters. From the perspective of affected interest, Canada's commitment to an inclusive democratic relationship requires institutions to place Indigenous standards and protocols of FPIC on equal standing with their own or, in some instances, recognize a right of political refusal (a veto). The less stringent standard of assent is suitable for negotiations involving interests that are alienable or appropriately balanced against other interests, but these are conditions that rarely apply to Indigenous claims. The higher democratic standard of mutual consent is necessary for negotiations involving the immutable relationship between lands and bodies, relationships involving cultural and bodily integrity that cannot be subordinated to commercial or public interests without incurring major sacrifices to democratic legitimacy, even where land has been formally alienated through sale, theft or treaty. As I shall argue in the next section, a strong sense of mutual consent is the normative criterion that Canadian institutions would advance in order to avoid implicating Indigenous peoples in an unconscionable bargain, which would place Canadian institutions in violation of common law principles of fiduciary obligation.

Indigenous Consent and Unconscionable Bargains

My discussion of unconscionability in this section seeks to identify further resources within Canadian law and politics that can be deployed in the reconceptualization of Canada's responsibilities to Indigenous peoples. In Canada's equity and common law traditions, an agreement is unconscionable when parties occupying unequal positions in terms of capacity or vulnerability come to an agreement that the weaker party would not have reasonably accepted under conditions of equality (Bogden, 1998). Canadian law has been clear with respect to the treatment of vulnerable individuals and groups who are drawn into unreasonable and exploitative agreements, most notably, in a case I will present below involving a vulnerable women who consented to sexual relations with a doctor who was subsequently judged to have behaved unconscionably and, therefore, was judged to be in breach of his fiduciary duty.

The first thing to note is that the Crown does not have to resort to overt coercion of Indigenous peoples to be considered in violation of a fiduciary duty. When, in the 1950s, the Department of Indian Affairs planned to relocate two Inuit communities who refused to move, as the RCAP report describes it, "coercion—in the form of withheld or eliminated funding for housing, schools and services—coupled with promises of improved housing, health and education facilities, and economic opportunities, ensured Aboriginal 'consent'" (1996: 426). This was one of many examples of colonial force and manipulation in Canadian history. But agreements made in the absence of coercive withholdings and promises can still be considered exploitative and unconscionable. The Supreme Court of Canada case *Hodgkinson*

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v. Simms stated this explicitly: "While the existence of a fiduciary relationship will often give rise to an opportunity for the fiduciary to gain an advantage through undue influence, it is possible for a fiduciary to gain an advantage for him- or herself without having to resort to coercion" (1994: 173–74). Moreover, vulnerability in this context "does not mean merely 'weak,'" but rather "connotes a relationship of dependency, an 'implicit dependency' by the beneficiary on the fiduciary" (218–19). A relation of dependency, as I noted in the introduction, can be simply administrative and should not be interpreted as precluding the agency of the beneficiary, nor should it be seen to absolve the fiduciary of their responsibility to gain a beneficiary's consent.

Normally, a party who brings forth an accusation of unconscionable conduct would have to prove the existence of a power imbalance but, unlike a contractual agreement in which equality of power is assumed between parties and must be proven otherwise, a significant power imbalance is the explicit source of Canada's status and responsibilities as fiduciary "protector of the sovereignty of Aboriginal peoples" (RCAP II, 1996: 244). The fiduciary role stipulates that the Crown must at all times "prevent exploitation" (*Guerin* v. *R.*, 1984) since a profound inequality of administrative and funding capacity is embodied in Canada's relationship of trust and loyalty with Indigenous peoples. Accordingly, I argue, Canada is in breach of its fiduciary obligations to the extent that it uses its financial and administrative capacities to entice Indigenous communities into agreements that they would not make under conditions of equality.

The classic ruling on unconscionability in Canadian jurisprudence is the British Columbia Court of Appeal case *Harry* v. *Kreutziger*, a case in which an uneducated and disabled Indigenous man agreed to sell his fishing boat along with his special commercial fishing license for a fraction of its worth, after which he discovered that the sale disqualified him from procuring another license. Harry sued the buyer, Kreutziger, and the court decided in Harry's favour on the grounds that although there was no overt coercion, Harry's vulnerability was nevertheless exploited to the advantage of the more capable Kreutziger. Elaborating on the doctrine of unconscionability itself, the court clarified that if the stronger party cannot provide proof that the reasonable expectations of the vulnerable party were met, there is "a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable" (1978: 22). It is not clear the extent to which Harry's status as an Indigenous man might have factored into the determination of his vulnerability, if at all (Lima 2008). The case is pertinent to our discussion for it provides clear indication that powerful parties are obliged to prove consent over mere consultation or assent.

After the *Harry* v. *Kreutziger* (1978) decision, the most relevant case of unconscionable agreement was the Supreme Court case *Norberg* v. *Wynrib* (1992), where it was determined that issues of consent and unconscionability applied not just to contracts as in *Harry* but to fiduciary relationships as well. In this case, Norberg, a woman with psychological and substance abuse issues, consented to a sexual relationship with her doctor, Wynrib, in return for pain medication. Norberg sued Wynrib and the court decided in her favour on the grounds that irrespective of the assent provided by Norberg, the doctor had acted unconscionably in taking advantage of her state of vulnerability and

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therefore acted in violation of a physician's fiduciary duty to patients. Unlike the *Harry* case, the court argued that the character of a fiduciary relationship is "conceptually distinct from the foundation and ambit of contract and tort," since in a contract "parties are taken to be independent and equal actors, concerned primarily with their own self-interest" (1992: 230). Whereas Harry had to prove a relation of unequal bargain power, an unequal relation is always assumed in cases in solving a fiduciary. In this context, then, the highest standards of consent must be met since the entrusted fiduciary is always in a position of seeking consent from a less powerful beneficiary.

The *Norberg* case offers additional insights. Whereas fiduciary obligations to Indigenous peoples are interpreted by Canadian courts as pertaining to specific cultural, legal, and economic interests, the *Norberg* court declared that "fiduciary relationships are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests" (1992: 499). In this case, a woman's interest in maintaining her reproductive autonomy and bodily integrity were violated and exploited. Her assent under conditions of a significant power imbalance was interpreted irresponsibly by her doctor as binding consent, in violation of his fiduciary obligation.

Again, it is uncertain whether the plaintiff's status as an Indigenous woman (a fact not even mentioned in the court documents) played any informal role in the assessment of her vulnerability. It is telling, however, that the *Norberg* decision explicitly cites *Guerin* v. *The Queen*, the case that clarified Canada's fiduciary duty to Indigenous peoples, as an example of how courts are able to adjudicate on "meritorious claims by the powerless and exploited against the powerful and exploitive" (1984: 291). The report of the Royal Commission on Aboriginal Peoples, when cautioning that Canada has a duty to Indigenous peoples that includes obtaining their consent, also drew explicitly from the *Norberg* v. *Wynrib* decision to illustrate the risk of imposing an unconscionable bargain. The Commission did not include the fact that Norberg *was* herself an Indigenous woman nor that the case involved a fiduciary who exploited and violated an Indigenous woman's reproductive autonomy, but these facts are pertinent insofar as they reflect fundamental concerns expressed in RCAP as well as the TRC, that the satisfaction of Indigenous standards of consent is foundational to the legitimacy of democratic decision making in Canada. The portion of the *Norberg* decision that RCAP quotes is broadly applicable today:

> In some circumstances, a position of relative weakness can interfere with the freedom of a person's will. Accordingly, our notion of consent must involve an appreciation of the power relationship between the parties. In certain circumstances, consent will be considered to be legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely. (1996: 485)

Elected representatives have occasionally expressed similar concerns. In 1983, for instance, Manitoba MLA Conrad Santos argued that treaties in which Indigenous peoples are asserted to have surrendered territory for meagre compensation are akin to "an unconscionable contract" (4194). Precisely this perspective was

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reflected a year later in *Guerin*, wherein the court observed that the Crown had acted unconscionably. If Canadian institutions are to avoid repeating the undemocratic exploitation of power imbalances when courting Indigenous agreement on issues of land, those institutions will need to acknowledge that mere assent under conditions of unequal bargaining power is insufficient and that fulfilment of the Crown's fiduciary duty requires the highest standards of mutual consent rather than mere consultation.

Conclusions: Broader Implications

I have outlined a number of examples and standards of consent from Canadian democratic thought, common law, and international law to demonstrate that Canada has existing resources for reconstructing its approach to Indigenous inclusion in democratic decision-making processes. There are, no doubt, many more than could be added. Although I have dealt mainly with contemporary examples, there are lessons in historical agreements. We see a violation of basic standards, for instance, in treaty negotiations in which Indigenous relations to land were conceived of as usufructary or proprietary and therefore as alienable or extinguishable. According to the standard of mutual consent, negotiations that were conducted under the shadow of military intervention, starvation or control of economic resources, "would be considered unconscionable transactions because of the imbalance in power between the parties and the nature of the bargains" (Eyford, 2015: 70). That said, oral traditions and direct accounts of historical treaties give us insight into whether Indigenous peoples freely consented as equal parties or merely assented from a position of vulnerability. In cases where a historical treaty is understood by an Indigenous community as reflecting the free, prior and informed consent of their peoples and leadership those agreements should be appropriately honoured.

We find further violations, however, in the persistence of the *Indian Act* and in jurisprudence that narrows the scope of the Crown's fiduciary responsibilities (Johnston, 1989). Perhaps it goes without saying that Canada cannot legitimately appoint or otherwise determine *who* qualifies as an Indigenous representative since those determinations are made by the communities themselves according to their own traditions. Likewise, although a modern treaty system is ostensibly at work in areas such as British Columbia, and a new era of nation-to-nation agreements has been pronounced (Prime Minister of Canada, 2015), it remains true that insofar as Indigenous peoples' traditions of consent are not given equal weight, there is a strong likelihood that any future agreements or treaties will manifest yet another unconscionable bargain (Macklem, 2011: 241 n.4; see also, McNeil, 2008: 5 n.11).

I have addressed only those burdens of sustaining democratic legitimacy that fall on Canadian institutions and Canadian society. In the end, officials will often choose to unilaterally conceptualize the Crown's role as fiduciary in circumscribed terms of mere assent (see *Wewaykum*, 2002) or apply weak standards of consultation and accommodation that deal narrowly with claims limited to title, treaty or harvesting rights. I hope to have demonstrated a few reasons why this approach severely diminishes the legitimacy of Canadian decision-making institutions and how the problem might be resolved. First, meeting the basic threshold of mutual consent that Canadian governments and officials increasingly profess to uphold

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would require them to abjure the imperious temptation to impose parochial standards of FPIC. Second, securing democratic legitimacy requires that the Crown refuses to use the administrative and economic power of the state, which define its fiduciary role relative to Indigenous peoples, as leverage to ensnare Indigenous communities in unconscionable bargains, agreements that they would not otherwise view as reasonable, fair, or equitable. Third, Canada would accept as *sui generis* those rights of jurisdiction over land rooted in vital relations of health and well-being, as well as a corollary right of refusal or veto over decisions deemed by affected parties to be unwanted. As the jurisprudence dealing with unconscionable violations of fiduciary duty suggests, the rights of a beneficiary to bodily integrity and reproductive autonomy cannot be overridden on the grounds that the fiduciary wishes to satisfy their needs or desire for access. For consent to be legitimate from both a democratic and common law perspective it must be free in terms of recognizing a right of refusal, prior in terms of both temporal and structural precedence, and informed by Indigenous knowledge systems. Under conditions of inequality, mere assent, or the standard of consultation and accommodation, are not legitimate legal or political benchmarks of binding agreement.

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